Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-184

In The
Supreme Court Of The United States
October Term, 1998

THE STATE OF WYOMING,
Petitioner,

v.

SANDRA HOUGHTON
Respondent.

On Petition for a Writ of Certiorari to the
Wyoming Supreme Court

BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT SANDRA HOUGHTON

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December 8, 1998

QUESTION PRESENTED FOR REVIEW

I. Should the decision of the Wyoming Supreme Court in *Houghton v. State*, 956 P.2d 363 (Wyo. 1998), be left undisturbed because, according to the criteria established in *Michigan v. Long*, 463 U.S. 1032 (1983), the judgment rests on adequate and independent state grounds?

II. Does the Fourth Amendment protect a passenger in a vehicle from searches of her belongings where the police officer lacks independent suspicion of that passenger or independent probable cause to believe her belongings contain evidence of a crime?

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BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT SANDRA HOUGHTON

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

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[1] The parties have consented to the filing of this brief. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Aaron Brinkman, Columbia Law School, J.D. 2000. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

The Rutherford Institute (TRI) is a non-profit organization established in 1982 and based in Charlottesville, Virginia, providing legal services nationwide in defense of civil liberties and human rights. Attorneys affiliated with the Institute have appeared numerous times before this Court on such matters, most recently as counsel of record for Respondent in *Arkansas Educational Television v. Forbes*, Sup.Ct. No. 96-779 (October Term, 1996).

II. SUMMARY OF ARGUMENT

While this case raises a plethora of fascinating Fourth Amendment issues, The Rutherford Institute would like to first bring another matter to the attention of the Court. *See* Supr. Ct. R. 37.1. TRI urges this Court to first consider the preliminary issue of jurisdiction. The Wyoming Supreme Court's ruling should be left undisturbed by this Court, under the criteria established in *Michigan v. Long*, 463 U.S. 1032 (1983), because the decision rests on adequate and independent state grounds.

If the Court asserts jurisdiction over this case, it should affirm the judgment of the Wyoming Supreme Court because the Fourth Amendment protects a passenger in a vehicle from searches of her belongings where the police officer lacks independent suspicion of that passenger or independent probable cause to believe her belongings contain evidence of a crime.

III. ARGUMENT

A. Adequate independent state grounds existed

for the Wyoming Supreme Court judgment.

1. The Wyoming Supreme Court's ruling did not rest primarily on federal law.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court set out criteria explaining when it will decline to review a decision of a state supreme court because the case rests on adequate and independent state law grounds.

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

The Wyoming Supreme Court's decision in *Houghton v. State*, 956 P.2d 363, although citing some illustrative federal cases, is sufficiently based on non-federal sources and reasoning to clearly demonstrate independent and adequate state grounds for judgment. The Wyoming Supreme Court relied primarily on non-federal law and arrived at the ruling which it judged to best comply with its own state precedent in the law of search and seizure. Even though the opinion arguably lacks a single explicit statement that the decision rests on independent state grounds, the evidence of such independent grounds is ample. *Michigan v. Long* is best followed, and its interests best served, by this Court's decision to decline jurisdiction in this case.

The Wyoming Supreme Court's decision in *Houghton* is striking for the number and quality of citations made to non-federal law. The court analyzed cases from sixteen other states, eight prior Wyoming Supreme Court decisions, eight federal district or circuit court decisions, and nine United States Supreme Court decisions. The Wyoming court discussed at length the strengths and weaknesses of the legal tests used in various jurisdictions before settling on the one it chose.

The case before the Court today is in stark contrast to the grounds of the state court opinion that this Court faced in *Michigan v. Long*. The Michigan Supreme Court decided *People v. Long (I)*, 320 N.W.2d 866 (Mich. 1982), *rev'd sub nom., Michigan v. Long*, 463 U.S. 1032 (1983), *on remand*, *People v. Long (II)*, 359 N.W.2d 194 (Mich. 1984) (reaching same result on different federal grounds), using only one state precedent and relying on federal authority for the remainder of its opinion. The one state case was cited for a point only tangential to the main argument. *See Long (I)*, 320 N.W.2d at 870, n.8. The opinion in that case was heavily weighted by federal authority. In fact, the state court itself made clear that the controlling authority for the decision was *Terry v. Ohio*, 392 U.S. 1 (1968).

Another telling difference between *Michigan v. Long* and the case today before this Court is how differently the Supreme Courts of each state handled the decision from the court below it. In Wyoming, there is no intermediate appellate court, so the Supreme Court of Wyoming heard this case on appeal directly from the trial court. The decision of the district judge to deny Houghton's motion to suppress the evidence against her was based on *California v. Acevedo*, 500 U.S. 565 (1991). This may appear analogous to the case in *People v. Long (I)*, where

the lower court's ruling was based on *Terry v. Ohio* and the Michigan Supreme Court made its decision discussing the requirements under that controlling precedent. However, in contrast, the Wyoming Supreme Court immediately began its discussion by distinguishing the federal precedent in *Terry* from the Wyoming precedents of *Guerra v. State*, 897 P.2d 447 (Wyo. 1995), *Saldana v. State*, 846 P.2d 604 (Wyo. 1993), and *Hall v. State*, 911 P.2d 1364 (Wyo. 1996). The Wyoming Supreme Court used *Acevedo* only as one of many persuasive authorities. *See Houghton*, 956 P.2d at 365-66. In addition, the Wyoming Supreme Court acknowledged in its opinion that the Wyoming state constitution is somewhat stronger in its protection from unreasonable searches and seizures than its federal counterpart. *Houghton*, 956 P.2d at 366, n. 2, *citing Wyoming Const.*, art. 1, § 4. This evidence shows the intent of the Wyoming Supreme Court to establish an independent ground for its decision based on state law precedents but informed by precedents from federal and other state cases.

Finally, the Wyoming Supreme Court was clearly concerned primarily about complying with its own law, not applying federal law. The ground for deciding the case was not how well state law comported with federal precedents (i.e. dependent grounds), but rather, how well the particular search and seizure test chosen from an analysis of cases from federal law, state law, and the laws of other jurisdictions comported with Wyoming precedents (i.e. independent grounds). The Wyoming Supreme Court determined that:

> the 'notice' approach most closely adheres to our analysis in previous cases. *See Gronski v. State*, 910 P.2d 561, 564 (Wyo. 1996) (warrantless search of duffel bag in trunk of car held proper because probable cause existed to believe the

> duffel bag contained marijuana) and *Hunter v. State*, 704 P.2d 713, 717 (Wyo. 1985) (warrantless search defined by the object and the places in which there is probable cause to believe it may be found).

Houghton, 956 P.2d at 370.

It is Justice Golden's dissenting opinion, not that of the majority in *Houghton*, which relies primarily on federal law. Arguing that Fourth Amendment precedent clearly requires affirming the district court's conviction of Houghton, the dissent quotes almost entirely from federal law. *See Houghton*, 956 P.2d at 372-73 (Golden, J. dissenting). To the dissent, then, the federal law on the issue compelled the affirmance of the lower court's opinion. The majority, however, took great pains to analyze the issue independently, examining the approaches of various sovereigns, and coming to an independent conclusion that was arguably at odds with some federal law on the question.

Petitioners rely on footnote two of the Wyoming Supreme Court's opinion in *Houghton v. State* to assert that the court was intending to rest its decision on federal grounds alone. *Brief for Petitioners* at 4, n. 2. In the court's footnote, it stated that the Wyoming state constitution's protection from searches and seizures is "somewhat stronger than its federal counterpart" and "although Houghton's claims rely on both federal and state constitutional mandate, she does not distinguish the protection afforded by the Wyoming constitution from that of its federal counterpart." *Houghton*, 956 P.2d at 366, n.2, *citing Hall v. State*, 911 P.2d 1364, 1368 (Wyo. 1996), and *Gronski v. State*, 910 P.2d 561, 566 (Wyo. 1996). By citing *Gronski*, the Wyoming Supreme Court was

signalling its refusal to broaden state constitutional protection in the absence of specific briefing on that issue. *Gronski* ruled that "until appropriate state constitutional analysis is presented, an invitation that we should expand the rights protected by the state constitution beyond the protection provided by the federal constitution will not receive the court's attention." 910 P.2d at 565, *citing Goettl v. State*, 842 P.2d 549, 557 (Wyo. 1992). In other words, where a controlling federal precedent exists, the court will not rule *ex post* that the state constitution extends beyond that precedent unless one of the parties presents an independent state constitutional argument for doing so. However, in the absence of such a controlling federal precedent the state court is free to make independent legal determinations about the protection its constitution affords to criminal defendants.

Thus the Wyoming Supreme Court in *Houghton* first surveyed the legal landscape to determine if there was a federal precedent controlling, *see Houghton*, 956 P.2d at 366-369, and then applied what they found to be the most reasonable standard, and the one most rationally related to its own settled state law. *See Houghton*, 956 P.2d at 369-371. In such a situation, the court is ruling on grounds that are independent of federal law.

2. The Wyoming Supreme Court did not feel "'compelled'" by federal constitutional considerations to "'construe its own law in the manner it did.'" *Michigan v. Long*, 463 U.S. 1032, 1044 (1983)(quoting *Zacchini v. Scripps-Howard Braoadcasting Co.*, 433 U.S. 562, 568 (1977)).

The Wyoming Supreme Court cited more non-federal

than federal law and selected a legal test based on how well it complied with state law. *See* section "A" *supra.* In these circumstances, absent compelling contrary evidence, no one could credibly argue that the Wyoming Supreme Court felt "'compelled'" by federal constitutional considerations to "'construe its own law in the manner it did.'" *Michigan v. Long,* 463 U.S. at 1044 (quoting *Zacchini v. Scripps-Howard Braoadcasting Co.*, 433 U.S. 562, 568 (1977)).

3. Refusing jurisdiction in this case furthers the purposes of *Michigan v. Long*.

The criteria set forth in *Michigan v. Long* were not simply a convenient method to manage the Court's docket, but rather an attempt to properly balance a number of vital competing interests. On the one side of the balance, this Court recognized the need to allow state courts to interpret state laws, 463 U.S. at 1039, to preserve federalism by respecting the independence of state courts, *id,*. and to avoid rendering advisory opinions. *Id.* On the other hand, the Court also wanted to avoid delay and increase the efficiency of judicial administration, *id.* at 1039-40, and promote uniformity of federal law. *Id.* at 1040.

Declining jurisdiction in this case would best serve the interests that *Michigan v. Long* sought to balance. While there does exist a lack of uniformity about the proper interpretation of this area of search and seizure law, choosing this case to clarify it would do too much damage to the independence of state courts. Wyoming has given a high degree of protection to its citizen. Overturning this decision and insisting on a lower degree of protection will not ensure the protection of an important federal right -- it will only force the Wyoming Supreme Court to go back in this case to reiterate its higher

level of protection. Not only will this process waste judicial resources, but it will also constitute an advisory opinion. As this Court reasoned in *Herb v. Pitcairn*, "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion" 324 U.S. 117, 126 (1945)(quoted approvingly in *Michigan v. Long*, 463 U.S. at 1042).

In the years since this Court decided *Michigan v. Long*, the Court has routinely assumed and extended its jurisdiction over the decisions of state supreme courts, sometimes with and sometimes without a rigorous analysis under *Michigan v. Long*. *See, e.g., Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Harris v. Reed*, 489 U.S. 255 (1989); *Montana v. Hall*, 481 U.S. 400 (1987)(per curiam); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Ponte v. Real*, 471 U.S. 491 (1985). Indeed, in *Pennsylvania v. Labron* this Court was undeterred by even the plain statement of the Pennsylvania Supreme Court that it was basing its judgment on the Pennsylvania constitution and Pennsylvania law, rather than on federal law.

In *Michigan v. Long*, this Court established a high hurdle with a rebuttable presumption of no adequate and independent state grounds unless the state court plainly so states. In *Pennsylvania v. Labron* this Court raised the bar further, turning *Michigan v. Long*'s rebuttable presumption into a seemingly irrebuttable presumption of no adequate state grounds, regardless of statements by the state court to the contrary by the state court. TRI urges this court to re-examine the important issues of respect for state courts, finality, federalism, and judicial economy it sought to protect in

Michigan v. Long. Because the Court has indicated its unwillingness to revise the *Michigan v. Long* test, we respectfully suggest that the Court at least return to an application of the *Michigan v. Long* doctrine which adequately protects these interests.

B. If the Court asserts jurisdiction over this case, it should affirm the judgment of the Wyoming Supreme Court.

1. The Fourth Amendment protects a passenger in a vehicle from searches of her belongings where the police officer lacks independent suspicion of that passenger or independent probable cause to believe her belongings contain evidence of a crime.

This Court established in 1948 that searching a passenger in a vehicle for evidence of a crime, without independent probable cause, was unlawful under the Fourth Amendment. *United States v. Di Re*, 332 U.S. 581 (1948). The Court explained, "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587. The same Fourth Amendment which protected the defendant in *Di Re* from a search of his person protects Houghton from a search of her "effects." The Fourth Amendment to the United States Constitution guarantees Houghton the right "to be secure in [her] person[], houses, papers and effects." The police officer in this case who searched Houghton's purse admitted that he did not have probable cause to believe that Houghton was involved in any illegal activity. (J.A. 21) Houghton had not been arrested prior to the search of her purse, and no contraband in her purse was in plain view. The search of her

purse without individualized suspicion, probable cause or warrant was therefore unreasonable and in violation of the Fourth Amendment.

None of the subsequent cases cited by petitioner alters that basic analysis. The holding of *New York v. Belton*, 453 U.S. 454 (1981), for example, is inapplicable to the case at bar. *Belton* held that a search incident to arrest may include a search of the passenger compartment and containers in it. This extensive search is justified by heightened security risks applicable to an arrest situation, and the need to prevent the destruction of evidence. *Id.* at 457. However, these justifications are not triggered when no one has been arrested. In Houghton's case, the search which included her purse was not a search incident to arrest at all, since neither Houghton nor the driver of the car were arrested prior to the search. In fact, the police ultimately never arrested the driver, *Houghton*, 956 P.2d at 365, and arrested Houghton only after discovering the contents of her purse.

Nor do the holdings in *United States v. Ross*, 456 U.S. 798 (1982) or *California v. Acevedo*, 500 U.S. 565 (1991) render a search of Houghton's purse reasonable under the Fourth Amendment. *Ross* established that the scope of a warrantless automobile search is no broader or narrower than could be authorized by a warrant. 456 U.S. at 825. Thus, under *Ross*, police officers who have probable cause to search a motor vehicle may presumptively search all containers within the vehicle that could contain the object of the search. *Acevedo* clarified *Ross* and its ancestor, *Carroll v. United States*, 267 U.S. 132 (1925):

> We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers

> within it where they have probable cause to believe contraband or evidence is contained.

Acevedo, 500 U.S. at 580.

Both *Ross* and *Acevedo* were based on, and drew their justification from, the "automobile exception," articulated in *Carroll v. United States*, *supra*. The *Carroll* exception, as explained in *Ross* and *Acevedo*, is an exception to the warrant requirement, not an exception to the requirement for probable cause. Just as a search pursuant to a search warrant may not exceed the scope of the warrant, a warrantless search of an automobile permitted by *Carroll v. United States* may not exceed the bounds of probable cause.

The Fourth Amendment permits a warrantless search of an automobile, provided probable cause exits. *Carroll v. United States, supra*. This probable cause presumptively extends to all the containers within the car that could contain the object of the search. *United States v. Ross*, *supra*. However, the *Ross* presumption does not cover objects which officers know are unconnected to the search. When police have information to negate the presumption that a container contains the object of the search, then they must not continue that aspect of the search. Thus, this Court stated in *Ross* that "probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." 456 U.S. at 824. The Court also stated in *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978) that the "critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." If such cause is lacking or negated, the search is not reasonable.

Where a purse belongs to an individual who is unconnected to the suspicion giving rise to probable cause, the presumption must be that the purse does not contain the object of the search. This is so because generalized probable cause dissipates in the face of particular information to the contrary.

We do not mean to argue that a passenger's effects are permanently exempted from search. If the police officer can establish suspicion of the particular passenger, or probable cause to believe the passenger's effects contain evidence of the crime, then her purse can be searched. Nor would we require that officers make "nice distinctions" about the ownership of each object in a vehicle prior to searching them. *See Ross*, 456 U.S. at 821. Where the officer does have information about ownership, however, he cannot ignore that information so as to give him leave to conduct an unreasonable search.

In the case at bar, the officer had no individualized suspicion of Houghton before searching her purse. He testified that prior to the search, he did not suspect her of illegal activity. (J.A. 21) At trial, the state proved that no other occupant of the car had opportunity to stash items in Houghton's purse immediately prior to or during the stop. *Houghton v. State*, 956 P.2d at 370-371. Prior to searching the purse, the officer knew or should have known that the purse did not belong to the driver. *Id.* at 370. When he opened the purse and pulled out the wallet with Houghton's identification, he had actual knowledge that the purse was Houghton's. Continuing the search in the face of specific knowledge that the purse was Houghton's, without individualized probable cause as to Houghton or her purse, was an unreasonable search of Houghton's effects under the Fourth Amendment.

The Court's *amicus* observes that two of the briefs in this case state or imply that the police officer's suspicion of the

driver can somehow be transferred to the passenger because the two are engaged in the "common consensual activity" or "common purpose" of travelling together and may reasonably be assumed to be engaged in other common activities. Brief for the United States as *amicus curiae* at 6, 12 (hereinafter "U.S. brief"); Brief for the Petitioner at 31. The United States asserts that this Court has implicitly recognized that "when evidence of a crime exists in an automobile, the passengers and the driver may well be involved in that crime together." U.S. brief at 13. Such an assumption would overrule this Court's holding in *United States v. Di Re, supra.* It would also present serious threats to the right of privacy, and the First Amendment right of association in this country. This Court has steadfastly refused to adopt the presumption of guilt by association in authorizing searches under the Fourth Amendment. For example, in *Ybarra v. Illinois*, 444 U.S. 85 (1979), this Court held that a patron's mere presence in a tavern, without more, did not justify a search of that patron under a search warrant issued for the tavern. The Court insisted that the probable cause standard as to that patron was necessary to balance his rights against the police officer's interests. *Id.* at 95-96.

Guilt by association is particularly inappropriate in this case. The driver was observed to be in possession of drug paraphernalia and he admitted to drug use. Even if the police officers suspected him of drug possession, "possession" is an individualized crime, and the officers had no cause to suspect Houghton of either drug use or possession. If Houghton can be suspected under these circumstances, then the police would have cause to search the briefcase of a passenger in a limousine if the driver was suspected of drug use. The Fourth Amendment does not tolerate such invasions of privacy on such tenuous and dangerous justification.

2. This Court's decision in *Minnesota v. Carter*,

No. 97-1147 (Dec. 1, 1998) supports Houghton's position that *her own* belongings are entitled to Fourth Amendment protection.

This Court recently ruled in *Minnesota v. Carter*, No. 97-1147 (Dec. 1, 1998), that persons who are temporarily in someone else's home to conduct business have no "legitimate expectation of privacy" in that home, and thus cannot seek Fourth Amendment protection from an unreasonable search of the home. This holding is not applicable to the case before us. Houghton is asking this Court to recognize her expectation of privacy in *her own* handbag, not in the handbag of someone else.

The Fourth Amendment guarantees Houghton the right "to be secure in [her] person[], houses, papers and effects." None of the parties or *amici curiae* contest the fact that her purse is one of her effects, falling under Fourth Amendment protection. No member of the Court in *Minnesota v. Carter* contested the fact that the Fourth Amendment protects, at the very least, a person's own self and home and papers and effects. *Minnesota v. Carter*, therefore, reinforces Houghton's position.

IV. CONCLUSION

The Rutherford Institute, as *amicus curiae*, urges this court to refuse to assert jurisdiction over this case because the judgment of the Wyoming Supreme Court can be shown, under the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983), to be based on adequate and independent state grounds.

If the Court asserts jurisdiction over this case and decides it on the merits, this Court's *amicus curiae* urges the Court to affirm the judgment of the Wyoming Supreme Court reversing

Houghton's conviction based on a passenger's Fourth Amendment right to be free from unreasonable searches of her belongings.

Respectfully submitted,

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December 8, 1998